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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 110

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

C. E. NIEHOFF & CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR C. E. NIEHOFF & CO.

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STATEMENT.

There is no dispute concerning the facts relating to the question presented for review in this proceeding.

Respondent manufactures and sells on a nation-wide basis a complete line of automotive ignition replacement parts (excepting spark plugs and batteries), as well as a complete line of hydraulic brake replacement parts and a line of testing equipment (R. 981, 1014).

In the year 1949 Respondent's total sales amounted to approximately $2,000,000, 90 per cent of which were derived from its ignition line (R. 982). Respondent's ignition sales amount to less than one-half of one per cent of the total national ignition replacement parts market (R. 943, 978).

Respondent is unable to sell any of its ignition products to the automobile manufacturers for installation as original equipment on new cars at the factory, this part of the national market being entirely pre-empted by the so-called "original equipment" manufacturers, namely General Motors through its Delco Remy division, Chrysler through its Auto Lite division, and Ford (R. 942, 978, 1014).

Consequently, Respondent's sales are limited entirely to the replacement parts field, referred to in the trade as the "after market". Even in this limited area of the market Respondent is unable to sell its products to any of the franchised automobile dealers, such as Chevrolet, Buick, Chrysler and Ford, that portion of the after market also being pre-empted by the original equipment manufacturers (R. 944, 978, 995, 1014).

Thus, Respondent's sales are confined entirely to jobbers, who in turn supply Respondent's lines to independent garage owners, filling stations and fleet operators (R. 982, 1014).

In the early 1930's, well prior to the enactment of the Robinson-Patman amendment to the Clayton Act, Respondent adopted the annual volume discount sales plan traditional in the automotive replacement parts field (R. 993). Under Respondent's plan, which is fairly and uniformly administered and is made available to all of Respondent's jobber purchasers alike (R. 985), Respondent charges its jobber purchasers the following net prices (R. 945, 979, 982, 983, 1014):

Annual Purchases	Discount Allowance
Under $1,200	None
$1,200-$2,400	5%
$2,400-$3,600	7%
$3,600-$6,000	10%
$6,000-$8,400	10% + 5%
$8,400-$12,000	10% + 6%
$12,000 and over	10% + 7%

Sales to jobbers purchasing less than $1,200 annually represent 7.5% of Respondent's total sales; sales to jobbers whose purchases range from $1,200 to $3,600 annually represent 18.8% of Respondent's total sales; sales to jobbers whose purchases range from $3,600 to $6,000 annually represent 25.8% of Respondent's total sales; and sales to jobbers purchasing more than $6,000 annually represent 47.8% of Respondent's total sales (R. 983).

Respondent has 19 principal competitors in the sale of its ignition line, substantially all of whom offer an annual volume discount purchase plan similar to, though not identical with, the plan used by Respondent (R. 996-999, 1018, 1040).

At hearings held before the Hearing Examiner in Chicago, Illinois, on May 16, 1951 and September 4, 5 and 6, 1951, Respondent introduced into evidence the names of these principal competitors and made proof of the volume discount methods used by each (R. 160, 189-191, 200-391).

The Hearing Examiner found that Respondent has, and for many years has had, severe and bitter competition from its competitors (R. 992), substantially all of whom grant volume discounts similar to Respondent's from list prices which on the average are lower than Respondent's list prices (R. 997-999). Because of this severe competition the Hearing Examiner also found that Respondent is experiencing difficulty in maintaining its sales volume, and from 1949 to 1951 actually showed a decline in the number of

jobber accounts sold by it notwithstanding the fact that the number of potential jobber accounts increased sharply in the same period (R. 992).

The Court of Appeals found that the uncontradicted evidence establishes that Respondent will be forced out of business if the traditional pricing practices which it now follows are denied to it while its competitors are free to continue such practices (R. 1040).

This evidence shows conclusively that if Respondent were compelled by an order of the Commission to sell its products at uniform prices without granting any annual volume purchase discounts, while its competitors were not under similar restraint, Respondent would be forced out of business.[1]

This evidence establishes that if Respondent were so compelled to sell its products uniformly at its list prices without granting any volume discounts therefrom, Respondent would lose all of its present jobber accounts to its competition with the exception only of its small volume accounts which presently receive no discount; that since these accounts represent only 7.5% of Respondent's volume, the adoption of such a uniform price would reduce Respondent's annual sales volume 92.5% and, perforce, Respondent would be compelled to cease its operations (R. 208, 209, 456-460, 578-586).

If, as a second alternative, Respondent granted all of its jobber purchasers a uniform 10% discount from Respondent's list price, Respondent would lose to its competition all of Respondent's jobber accounts presently receiving a greater discount under Respondent's plan. These larger accounts represent 47.8% of Respondent's volume and the

1. The Hearing Examiner declined to make any finding respecting this evidence for the stated reason that it was beyond his jurisdiction. See proposed finding 75 and reasons in support thereof (R. 975-977); and Hearing Examiner's Ruling (R. 980).

ss of this volume would produce an annual operating loss Respondent of $123,000 (R. 208, 209, 457, 458).

Lastly, if Respondent granted a uniform 15% discount om its list prices to all jobber purchasers, Respondent's sses would be so great on its sales to the smaller jobber ccounts that it would incur an annual operating loss of early $100,000 (R. 208, 209, 458, 459).

In its appeal to the Federal Trade Commission from the itial decision of the Hearing Examiner, Respondent assigned exception to the failure of the Hearing Examiner to nclude a finding that Respondent would have to cease its perations and go out of business if it were compelled to ell at a uniform price while its competitors were not under imilar restraint, and requested the Commission to hold the ecommended cease and desist order against Respondent n abeyance until all other ignition parts manufacturers ere similarly enjoined. This the Commission refused to lo, and directed that Respondent "forthwith" cease and lesist its pricing practices (R. 1012, 1026).

In its petition filed with the United States Court of Appeals for the Seventh Circuit for a review of the order of he Federal Trade Commission, Respondent assigned as ne of the grounds upon which it sought relief from the rder of the Commission, the following (R. 1031):

> "The issuance of said order * * * is a misuse of the [Commission's] discretion, for the evidence establishes that any requirement that [Niehoff] sell at uniform prices while its competitors are not under like compulsion will destroy [Niehoff's] business."

The Court of Appeals found that the uncontradicted vidence established that Respondent would be forced out of business if its competitors were not similarly restrained, nd that the Commission did have the power, under Section 11 of the Clayton Act, to postpone the effective date of the

order against Respondent. In this connection the Court stated (R. 1040, 1042):

> "At this point we consider Niehoff's prediction that it 'would be forced out of business if the traditional pricing practices which it now follows were denied to it while its competitors are free to continue such practices.' There is uncontradicted evidence in the record to factually support this prediction.
>
> "The record shows that, as to the automotive ignition line which constitutes at least 90% of Niehoff's business,[9] it has 19 competitors, and included in this group are 3 competitors who presently have complaints or orders to cease and desist pending against them before the commission, the other 16 competitors being free to continue their present pricing practices unless and until cease and desist orders are entered against them in proceedings not yet commenced.
>
> "It thus appears that the order against Niehoff was entered at a time when the commission had acted against only a few of this firm's competitors. We are persuaded by Niehoff's argument that, in view of the lapse of time which is inevitably involved in proceedings before the commission, Niehoff's business will suffer economic extinction before the commission adjudicates upon trade practices of Niehoff's competitors, which in their purpose and effect are essentially similar to those condemned in the Niehoff order. This result will follow if Niehoff is required by elimination of its present selling methods to charge higher prices for its products than the prices charged by its competitors against whom the commission has not yet ruled.
>
> "The commission takes the position that it has no power to stay compliance with its order. It relies upon a part of section 11 of the amended Clayton Act,[10] contending that it has no discretion as to the enforcement of the law. It fails to cite that part of section 11 which provides that the commission 'shall issue * * * an order

9. Another 6% of Niehoff's business is in the hydraulic line where it has 10 principal competitors.

10. 15 U. S. C. A. § 21.

requiring such person to cease and desist from such violations * * * *within the time fixed by said order.'* (Italics supplied for emphasis.) It is our opinion that this statutory language vests in the commission power to postpone the time at which an order is to take effect.

"In any event, the commission in this case has not exercised this permissive power under section 11, and it argues that this court has no power to delay or postpone compliance with the commission's order. If this be true we are impotent to postpone the effective date of the order and, furthermore, under section 11 of the act we can be required to enforce the order in the manner therein provided without delay. In other words, according to the commission, we may witness and participate in, but not interfere with, the economic death of Niehoff while the commission machinery continues to operate toward cease and desist orders against Niehoff's competitors.

"However, we do not admit judicial impotency in this situation. Section 11 of the Clayton Act[11] gives this court power, *inter alia*, to modify an order of the commission. This includes the power to change that part of an order stating when it shall take effect. We have held[12] that the power of a court of appeals to enforce, set aside or modify the commission's order is an exercise of original jurisdiction, rather than appellate jurisdiction, and that the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. The order in this case was issued on May 17, 1955 and directed that Niehoff 'forthwith' cease and desist. This order is in the nature of an injunction. We have a right to consider its effect upon Niehoff in the light of equitable principles, and to grant relief accordingly. We have no way of knowing in advance what further proceedings, if any, will be had by the commission against Niehoff's competitors to whom we have heretofore re-

11. 15 U. S. C. A. § 21.

12. *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 138 F. 2d 481, 484.

ferred. The fixing of the time at which the order against Niehoff shall become effective is a matter over which we now reserve jurisdiction, the exercise of which will depend upon the future course of the commission's proceedings against Niehoff's competitors. For that reason the order against Niehoff is hereby modified by striking the word 'forthwith' therefrom and by adding to said order the following: 'This cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission.' As thus modified, the order is affirmed."

SUMMARY OF ARGUMENT.

Throughout this proceeding Respondent has made and preserved the point that the action of the Federal Trade Commission in ordering Respondent to cease and desist from granting to its purchasers the annual volume discounts traditional in the ignition replacement parts field while taking no steps to place Respondent's principal competitors in the ignition field under similar restraint, constitutes an abuse of discretion by the Commission, particularly so in view of the uncontradicted showing by Respondent that the Commission's action will place Respondent at such a competitive disadvantage as to force Respondent out of business.

On review of the Commission's order pursuant to Section 11 of the Clayton Act, the United States Court of Appeals has the power to affirm the cease and desist portion of that order and to defer the effective date thereof until such time in the future as that court, either on its own motion or on motion of the Commission, may direct.

The United States Court of Appeals admittedly has the power to correct an abuse of the Commission's discretion. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608.

Under Section 11 of the Clayton Act the Commission has the power to postpone the effective date of any cease and desist order entered by it, and, perforce, the United States Court of Appeals, in reviewing an order of the Commission, has the same power. *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619, 623.

Section 11 of the Clayton Act confers upon the United States Courts of Appeals original jurisdiction to enforce,

set aside or modify an order of the Federal Trade Commission entered under Section 2 of the Act, and, in pursuance of such original jurisdiction, the Courts of Appeals may enter orders protecting the rights of the parties in any manner in which a trial court of general equity jurisdiction might do in an injunction suit. *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 F. 2d 481 (C. A. 7), *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. 2d 182 (C. A. 2), *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364.

ARGUMENT.

At every stage of this proceeding Respondent has consistently adhered to the position that the Federal Trade Commission was and is guilty of an abuse of its discretion in seeking to compel Respondent to cease granting the annual volume purchase discounts traditional in the ignition field while taking no steps to compel Respondent's principal competitors in that field also to cease the same pricing practices (R. 208, 209, 593, 975-977, 1031).

In support of this contention Respondent introduced evidence before the Hearing Examiner which conclusively established that Respondent would be forced out of business if it were so enjoined while its principal competitors were free of any such restraint (R. 593).

The Hearing Examiner declined to make any finding respecting this evidence for the stated reason that it was beyond his jurisdiction (R. 975-977, 980).

In its appeal to the Federal Trade Commission from the intial decision of the Hearing Examiner, Respondent took exception to the Hearing Examiner's failure to make any finding respecting such evidence of irreparable injury and requested the Commission to stay the proceedings until all of Respondent's competitors were under similar restrictions (R. 1026). This the Commission refused to do, taking the position that it had no power to stay the effective date of its cease and desist order against Respondent, notwithstanding the unequivocal language of Section 11 of the Clayton Act which clearly grants to the Commission the unrestricted power to fix the time within which any cease and desist order entered by it shall go into effect (R. 1026, 1041).

In its petition to the United States Court of Appeals for a review of the Commission's order Respondent assigned, as one of its grounds for relief from the Commission's order, that the issuance of such order against Respondent was a misuse of discretion by the Commission since the evidence establishes that if Respondent is required to sell at uniform prices while its competitors are not under like compulsion, Respondent's business will be destroyed (R. 1031).

The Court of Appeals first held that there was no merit to the Commission's contention that the Commission had no power under Section 11 of the Clayton Act to stay the effective date of its cease and desist order against Respondent (R. 1041). The Court of Appeals next found that the uncontradicted evidence establishes that Respondent would be irreparably injured if it were forced to comply immediately with the Commission's order while Respondent's principal ignition competitors were not under similar orders. The court below thereupon modified the Commission's order in the manner stated above (R. 1040-1042).

Contrary to the contention made at page 17 of the Commission's brief, the conclusion is inescapable that the Court of Appeals sustained Respondent's assigned error and found that the action of the Commission, in utterly disregarding the ruinous effect its order would have upon Respondent, amounted to an abuse of discretion by the Commission which (as the Commission concedes at page 16 of its brief), the Court of Appeals has the power to correct: *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608.

In staying the effective date of the Commission's order the Court of Appeals did nothing more than grant Respondent relief which the Commission itself had the power to grant under Section 11 of the Clayton Act. This the

Court of Appeals also clearly has the authority to do. *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U.S. 619, 623.

Moreover, Section 11 of the Clayton Act confers upon the United States Court of Appeals, in matters coming before it on petitions to review cease and desist orders of the Federal Trade Commission issued pursuant to Section 2 of the Act, the power to enter a decree "affirming, modifying, or setting aside" any such order. After making this specific grant of power Section 11 then provides:

> "The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive."

Thus, Section 11 of the Clayton Act clearly confers upon the United States Court of Appeals original jurisdiction to enforce, set aside, or modify any order of the Federal Trade Commission entered pursuant to Section 2 of the Act and, in pursuance of such original jurisdiction, the court of appeals may enter orders protecting the rights of the parties in any manner in which any trial court of general equity jurisdiction might do in an injunction suit.

In *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 F. 2d 481, 484 (C. A. 7), the court stated:

> "We have previously said in *Century Metalcraft Corporation* v. *Federal Trade Commission*, 7 Cir., 112 F. 2d 443, that, under the Federal Trade Commission Act, 15 U. S. C. A. § 41, *et seq.*, Congress has made a grant of original jurisdiction to the court to enforce, set aside or modify the Commission's order and that such power carries with it authority to vacate or modify our own judgment whenever good cause is shown. This is in accord with announcements of other jurisdictions. We think it well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Court of Appeals, when granted by Congress, is original rather

than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. *Butterick Co.* v. *Federal Trade Commission*, 2 Cir., 4 F. 2d 910; *Silver Co.* v. *Federal Trade Commission*, 6 Cir., 292 F. 752; *Chamber of Commerce* v. *Federal Trade Commission*, 8 Cir., 13 F. 2d 673; *Federal Trade Commission* v. *Balme*, 2 Cir., 23 F. 2d 615, certiorari denied 277 U. S. 598, 48 S. Ct. 560, 72 L. Ed. 1007; *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 2 Cir., 58 F. 2d 182."

The Court of Appeals for the Second Circuit expressed the same view in its opinion in *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. 2d 182, 184 (C. A. 2), wherein it stated:

> "The Circuit Courts of Appeals are granted exclusive jurisdiction to enforce, set aside, or modify orders of the Commission. Judicial Code § 128 (28 U. S. C. A. § 225); Federal Trade Commission Act, § 5, 38 Stat. 719 (15 U. S. C. A. § 45). This court therefore has original jurisdiction in the matter of setting aside or modifying orders of the Commission. With such original jurisdiction, it has the power to vacate its own order upon good cause shown and where equity demands such action. Such power is inherent in a court of equity where a modification of an injunctive order is sought."

Similarly, the Court of Appeals for the Third Circuit, in *H. N. Heusner & Son* v. *Federal Trade Commission*, 106 F. 2d 596, 597, 598 (C. A. 3), in reviewing an order of the Commission directing a cigar manufacturer forthwith to cease and desist branding his cigars "Havana Smokers" (since they in fact contained no Havana tobacco), used its equitable power to modify the order so as to grant the manufacturer two years' time within which

to eliminate the word "Havana" in the designation of its product.

This Court, in *Ford Motor Co.* v. *National Labor Relations Board,* 305 U. S. 364, 373, in considering the jurisdiction of the Court of Appeals to review an order of the National Labor Relations Board, pointed out that the statute with respect to a judicial review of orders of that board follows closely the statutory provisions relating to the review of orders of the Federal Trade Commission; that the jurisdiction to review orders of the Labor Relations Board is vested in a court with equity powers, and that the court "may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action."

See also *Scripps-Howard Radio* v. *Federal Trade Commission,* 316 U. S. 4, 14, wherein this Court stated that courts of appeal have the power to prevent "irreparable injury."

Heretofore the Federal Trade Commission as well as other governmental agencies, when attacking for the first time the legality of a pricing or trade policy traditional to a given segment of the national economy, has, in recognition of the equitable principles announced by the court below, filed simultaneous complaints against the principal competitors in the field.

In *Federal Trade Commission* v. *Cement Institute, et al.,* 333 U. S. 683, in which case the Federal Trade Commission for the first time challenged the use of a multiple basing-point price system as being in violation of Section 2 of the Clayton Act, the Commission named as respondents in 12 separate cases some eighty-five principal competitors in the field.

This policy was also followed when the Commission attacked certain pricing and distribution policies of the

candy industry as shown by this Court's opinion in *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U. S. 304, wherein, after pointing out that the practice therein complained of was carried on by forty or more manufacturers, the court stated at page 308:

> "The disposition of a large number of complaints pending before the Commission, similar to that in the present case, awaits the outcome of this suit."

A similar result was achieved in the cosmetic industry by stipulation between the Commission and various competitors in that field whereby it was agreed that the cases against those competitors would abide the final determination by the Court of Appeals in the matter of *Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 156 F. 2d 132 (C. A. 2).

The Justice Department, in attacking the retail financing methods of General Motors, Chrysler and Ford, proceeded against all three of these competitors simultaneously, and in taking consent decrees against Chrysler and Ford, specifically provided that such decrees would not be enforced if an effective final order was not entered against General Motors within a specified time. See *Chrysler Corporation* v. *United States*, 316 U. S. 556, 558, and *Ford Motor Co.* v. *United States*, 335 U. S. 303, 308-311. In the *Ford Motor Co.* case, at page 307 this Court made the following statement:

> "Protection against competitive disadvantage, the appropriateness of which the government recognized, required a time certain at the end of which the restraint against Ford would expire if General Motors were still free of them."

In the instant case it was not until after Respondent made proof in the record on May 16, 1951 (R. 189), of its principal competitors in the ignition field using similar pricing methods that the Commission saw fit to file com-

plaints against two of such competitors, namely, P & D Manufacturing Co. and Sorenson Manufacturing Co.[2] One complaint had previously been filed prior to that time against a third competitor, but with these three exceptions the Commission has filed no complaints against any of Respondent's other principal competitors in the ignition field.

In an effort to deny that it is making Respondent a legal guinea pig, the Commission, at page 19 of its brief, volunteers the gratuitous information derived from sources wholly outside this record, that it has filed 14 complaints against members of the automotive replacement parts industry. However, only three of these are against companies engaged in selling ignition parts in competition with Respondent. The other 11 complaints are entirely immaterial to this case, for Respondent no more competes with a muffler or bumper manufacturer than it does with Kroger or A & P.

The Commission also suggests (at pages 19 and 20 of its brief) that Respondent may have little or no competition from its 19 principal competitors and would have this Court presume that the ignition manufacturers it has filed complaints against are the leaders in the industry. There is no basis in the record for such a presumption. The evidence shows that Respondent in fact has about 100 ignition competitors, 19 of whom are principal competitors, the others selling incomplete lines or competing against Respondent in only limited areas. The evidence also shows that Respondent has bitter competition on a nation-wide basis from these 19 competitors and the Hearing Examiner so found (R. 189, 310, 942, 978, 992). Of these competitors, three are the original equipment manufacturers who domi-

2. The complaint against P & D Manufacturing Co. was issued August 9, 1951 and the complaint against Sorenson Manufacturing Co. on October 16, 1952. These are the only competitors of Respondent named in the Commission's brief. For a complete list of Respondent's principal competitors see R. 942.

nate the market. The remaining 16 principal competitors maintain list prices comparable to Respondent's from which practically all of them grant annual volume purchase discounts similar to those granted by Respondent. Those who do not grant such discounts directly accomplish the same price result by distributing through NAPA or similar outlets (R. 265-319, 953-956, 979, 998, 999).

None of the cases cited by the Commission in its brief deals with a situation comparable to the one here presented to the court.

In *Federal Trade Commission* v. *Eastman Kodak Co.*, 274 U. S. 619 (cited at page 11 of the Commission's brief), the Commission ordered Eastman to cease and desist certain unfair practices, and, to implement that order, directed Eastman to dispose of certain processing laboratories. The Court of Appeals affirmed the cease and desist portion of the Commission's order but held that the Commission was without statutory authority to direct the divestiture. This Court affirmed, holding that the Commission did not have the equitable power which it had attempted to exercise. In reaching this conclusion this Court also pointed out that the Court of Appeals, in reviewing an order of the Commission, has the power to enter any order the Commission could have entered, and it was in connection with this discussion that it made the comments quoted in the footnote, page 11, of the Commission's brief.

In *American Chain & Cable Co.* v. *Federal Trade Commission*, 142 F. 2d 909 (C. A. 4), also cited at page 11 of the Commission's brief, a cease and desist order entered by the Commission under Section 5 of the Federal Trade Commission Act had been affirmed by the Court of Appeals. Thereafter the respondent American Chain presented its motion to the Commission requesting that enforcement of the order be stayed on grounds relating to the war emergency. The Commission refused to entertain

the motion, claiming it had no such authority. On American Chain's petition the Court of Appeals held that the Commission did have the authority to consider and pass upon the motion and entered an order directing the Commission to do so. The only bearing this decision has on the instant case is to support Respondent's contention here that the Commission has the authority to postpone the effective date of its orders.

The case of *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, does not involve Section 11 of the Clayton Act, having arisen under the Communications Act. Pottsville's original request for a license to construct a radio station had been denied by the Federal Communications Commission. This order was reversed on appeal and the application was remanded for further consideration. In the meantime two other applications had been filed for stations in the same area and the Commission set all three for joint consideration. On Pottsville's petition, the Court of Appeals issued its writ of mandamus directing the Commission to consider Pottsville's application alone on the basis of the original record. This Court reversed, holding that in dealing with matters involving public convenience and necessity the Commission was not limited to the original record but could consider the circumstances disclosed in the later applications, and it was in this connection that this Court made the statement quoted at page 12 of the Federal Trade Commission's brief.

Scripps-Howard Radio v. *Federal Communications Commission*, 316 U. S. 4, cited on page 12 of the Commission's brief, involves the single question whether the Court of Appeals has the power to stay an order of the Communications Commission pending review. This Court held that the Court of Appeals has such power, stating at pages 13 and 14 of its opinion that the power to stay is "firmly

imbedded'' in our judicial system, particularly where its function is to prevent ''irreparable injury''.

At pages 13 and 14 of its brief the Commission cites *United States* v. *Wabash Railroad Co.*, 321 U. S. 403, as a purported example of an analogous situation wherein this Court refused to sanction as a defense to an administrative order the fact that like orders had not been issued against competitors. That case is not analogous. There the Interstate Commerce Commission ordered the Wabash Railroad to cease its practice of spotting freight cars without cost at the plant of A. E. Staley Manufacturing Co., one of its shippers. Staley asked that the order be set aside, since its enforcement would place Staley at a competitive disadvantage unless similar orders were issued against railroads serving its competitors. This Court, after pointing out that under the Interstate Commerce Act, Staley, as a shipper, had the right to initiate proceedings with the Interstate Commerce Commission (under Section 13(1) of the Act) to compel the railroads serving Staley's competitors to stop the preferential practices, concluded that in view of this method available to Staley of ''inducing the Commission to perform its duty,'' the order should not be set aside.

In the instant case no such statutory method exists whereby Respondent Niehoff can induce the Federal Trade Commission to ''perform its duty'' respecting Respondent's competitors.

In the footnote appearing at page 14 of its brief the Commission, anticipating the foregoing distinction, points out that Respondent can bring treble damage actions or injunctive proceedings against its competitors. This Court's familiarity with the cost, difficulty and time-consuming nature of such alternative remedies is sufficient to disclose their total inadequacy. The Commission ignores the fact that the remedy available to Staley under the

Interstate Commerce Act was one before the Commission itself and that Staley had not seen fit to avail itself of that remedy. Here the situation is quite the reverse. At every turn of this proceeding Respondent has requested the Federal Trade Commission to hold its order in abeyance until similar orders have been entered against Respondent's competitors, but the Commission ignored all such requests, notwithstanding Respondent's showing of irreparable injury.

At page 15 of its brief the Commission cites the cases of *Standard Oil Co.* v. *United States,* 337 U. S. 293, and *National Candy Co.* v. *Federal Trade Commission,* 104 F. 2d 999 (C. A. 7). Neither of these cases touches upon the power of a court, upon a showing of irreparable injury, to stay the effective date of an order of the Commission pending the entry of similar orders against competitors.

Similarly, in *El Moro Cigar Co.* v. *Federal Trade Commission,* 107 F. 2d 429 (C. A. 4), no proof was made that the respondent would be injured by the entry of the proposed order. Cf. *H. N. Heusner & Son* v. *Federal Trade Commission,* 106 F. 2d 596 (C. A. 3) referred to above, where the Court of Appeals stayed an order of the Federal Trade Commission for a two-year period to protect the value of the secondary meaning of a brand name.

Conclusion.

The pricing methods followed by Respondent have been traditional in the ignition replacement parts field since long prior to the passage of the Robinson-Patman amendment to the Clayton Act in 1936. Until the present proceedings the validity of these pricing practices had never been questioned by the Federal Trade Commission. Under such circumstances the Commission, in challenging the validity of these pricing practices for the first time, should

have followed its customary practice of proceeding against all of the principal replacement parts ignition manufacturers simultaneously. Having neglected to do so (because of the Commission's obvious failure to make any investigation of the ignition replacement parts field prior to filing its complaint against Respondent, R. 856, 975-977), after Respondent made proof herein of its principal competitors and their pricing methods, the Commission should have then filed complaints against all such competitors. For reasons known only to itself the Commission followed neither course, but instead it elected to proceed against Respondent and to direct it forthwith to cease and desist such pricing practices in the face of an uncontradicted showing that the immediate enforcement of such an order against Respondent while its principal competitors were not likewise enjoined would force Respondent out of business.

It is impossible to explain the intransigent course which the Commission has followed in this proceeding. Its callous disregard for the economic havoc which the immediate enforcement of its order will inflict upon Respondent and its tenacious refusal to follow its customary methods of procedure in similar cases, establishes that the Commission is guilty of an abuse of discretion which the Court of Appeals, in the exercise of its equitable powers, clearly has the authority to prevent.

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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